TIM KIMMET
v.
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-72-A Decided November 20, 1990

Appeal from a decision declining to assess damages for cattle trespasses.

Affirmed in part; reversed and remanded in part.

1. Indians: Leases and Permits: Farming and Grazing

Under 25 U.S.C. § 466 (1988) and 25 CFR Part 166, the Bureau of Indian Affairs' principal responsibilities with respect to Indian grazing lands are to protect them and to promote their efficient use for the benefit of the Indian owners.

2. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands.

3. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

Damages assessed under 25 CFR 166.24(b) for cattle trespass to trust or restricted Indian lands should be calculated in accordance with 25 CFR 166.24(d), even if it is determined that they are payable to a lessee.

4. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

Once the fact of cattle trespass on Indian grazing lands has been established, a prima facie case has been made that forage has been consumed.

APPEARANCES: Rae V. Kalbfleisch, Esq., Shelby, Montana, for appellant; Norris M. Cole, Acting Billings Area Director, for appellee; David F. Stufft, Esq., Cut Bank, Montana, for Claire P. Smith.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tim Kimmet seeks review of a March 2, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to assess trespass damages against Claire P. Smith. For the reasons discussed below, the Board affirms the Area Director's decision in part, reverses it in part, and remands this case to him for further proceedings.

Background

This appeal concerns the same two Blackfeet farm/pasture leases that were the subject of the Board's August 18, 1989, decision in Claire P. Smith v. Acting Billings Area Director, 17 IBIA 231, reconsideration denied, 17 IBIA 285 (1989). In that decision, the Board affirmed the Area Director's determination that lessor Claire Smith's livestock were in trespass on the leases. 1/

On November 15, 1989, appellant submitted to the Blackfeet Agency, BIA, a claim for $34,415 in damages for the value of crops and forage he alleged were lost by reason of trespass and unauthorized grazing by Smith's cattle during 1986, 1987, and 1988. The Superintendent denied the claim on December 4, 1,989, stating:

> In reviewing your claim as written this Agency has previously instructed you and your client that under the regulations we can only assess for value of the forage consumed and for the crops that are destroyed or damaged.
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> This Agency has previously assessed damages on these leases on behalf of the Indian landowner for the grazing of livestock on the crop aftermath. [2/] It is this agency's decision to deny your request for payment of damages under 25 CFR 162.24 [i.e., 25 CFR 166.24].

Appellant appealed this decision to the Area Director, who affirmed it on March 2, 1990. In support of his decision, the Area Director first

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1/ Claire Smith is majority owner of the allotments subject to Lease No. L-2643 and sole owner of the allotment subject to Lease No. L-2734. Appellant is lessee on both leases.

BIA found 139 head of Smith's cattle on the leases on Nov. 18, 1986, and 1,384 head on Sept. 21, 1987. The Area Director's June 10, 1988, decision held these cattle to be in trespass, and the Board affirmed. See Smith for further background.

2/ The statement concerning a previous assessment of damages is apparently a reference to the Superintendent's Sept. 25, 1987, letter to Smith, assessing a $8,310.20 penalty for trespass by 1,384 cows and calves, as counted by BIA on Sept. 21, 1987. This was the decision affirmed by the Area Director and ultimately by the Board in Smith.

See footnote 8 below for discussion of the term "crop aftermath."

stated that appellant had made no claim for damages until after the Board's decision in Smith, although the matter had been in dispute since 1986. He then noted that appellant had not produced specific evidence concerning the trespasses or the amount of actual damages he sustained. Finally, the Area Director stated that, since appellant apparently did not graze cattle on the leased tracts himself, his damages attributable to the trespassing cattle were speculative.

Appellant's appeal from this decision was received by the Board on April 2, 1990. Appellant, the Area Director, and Claire Smith filed briefs.

Discussion and Conclusions

[1, 2] Under 25 U.S.C. § 466 (1988) and the regulations in 25 CFR Part 166, BIA's principal responsibilities with respect to Indian grazing lands are to protect them and to promote their efficient use for the benefit of the Indian beneficiaries. 3/ In connection with these responsibilities, 25 CFR 166.24(b) imposes a duty upon the Superintendent to collect penalties and damages for trespass. This subsection provides:

> Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass * * * together with the reasonable value of the forage consumed by their [sic] livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such

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3/ 25 U.S.C. § 466 (1988) provides:

"The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes."

25 CFR 166.2 provides:

"It is within the authority of the Secretary to protect individually owned and tribal lands against waste and to prescribe rules and regulations under which these lands may be leased or permitted for grazing. Improper use which threatens destruction of the range and soil resource is properly considered waste. * * * It is also the Secretary's responsibility to improve the economic well being of the Indian people through proper and efficient resource use."

Also relevant to this matter is 25 U.S.C. § 179 (1988), which provides: "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock."

> penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid, and reimbursement for expenses incurred in impoundment and disposal shall be credited as appropriate.

The Superintendent's authority to compensate a lessee out of damages collected from a trespasser is permissive under this subsection; however, his duty to assess and collect penalties and damages in the first instance is mandatory.

The Area Director's decision indicates that the Superintendent "waived" damages and penalties in this case--presumably including the $8,310.30 penalty assessed in the Superintendent's September 25, 1987, letter to Smith--because "the landowner who was to receive the compensation, was also the trespasser who was being assessed the penalty" (Area Director's Decision at 5). No written "waiver" is included in the record. The Board notes that Smith is not the sole owner of the allotments subject to Lease No. L-2643. 4/ The Superintendent had no authority to waive penalties or damages payable to the other landowners. Accordingly, on remand, as further discussed below, the Area Director shall see that the other landowners' portion of the penalty assessed in 1987 is collected from Smith and credited to them.

The Superintendent's September 25, 1987, letter to Smith did not make an assessment for damages. Apparently, therefore, it was not until appellant submitted his claim in November 1989 that BIA considered the question of damages.

The Area Director's decision suggests that appellant's claim for damages was untimely. Smith argues before the Board that "time [has] long since expired on this matter" (Smith's brief at 5). Appellant argues that he was not required to submit his claim for damages until after the Board's decision in Smith established finally for the Department of the Interior that Smith's cattle were in trespass.

25 CFR 166.24(b) does not establish a deadline for the submission of claims by lessees. In general, lessees seeking compensation under this

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4/ Lease No. L-2643 covers 1,794.26 acres in Blackfeet Allotments 1664-B, 1708-A, 4083-A, and 5210. The lease indicates that Smith owns an undivided 2/3 interest in Allotment 5210, with the remaining 1/3 interest owned by the Estate of Raleigh Smith. (This estate has since been probated. See Perian Smith v. Acting Billings Area Director, 18 IBIA 36 (1989).) It appears that Smith owns an undivided 1002/1008 interest in the other allotments, with the remaining interests owned by George H. Jake, Susan Jake, Ida Jake, Darryl Kipp, Mary K. Jake, and Josephine Jake.

provision should submit claims promptly. The lack of diligence on the part of a lessee would, in some--perhaps most--cases, justify BIA's refusal to consider the lessee's claim. In particular, if BIA had already assessed, collected, and credited trespass damages to the landowners, a lessee's subsequent claim would reasonably be rejected as untimely. In this case, however, BIA has not yet assessed any damages, and thus there remains an opportunity to consider the claim of appellant vis-a-vis the interests of the landowners. Further, in this case, appellant's failure to submit his claim earlier may be excused, in part at least, by the initial uncertainty surrounding the question of whether Smith could be found liable for trespass at all. For these reasons, the Board finds that appellant's claim should not be rejected as untimely.

[3] 25 CFR 166.24(d) provides:

> Settlement. The amount due the Indian landowner and/or the United States in settlement for unauthorized grazing use shall be determined by the Superintendent as follows:
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> * * * * * *
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> (2) A reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation for the kind of livestock concerned, or the estimated commercial value for such privileges if no comparable grazing privileges are sold.
>
> (3) Damages to Indian or Government property injured or destroyed.

Appellant argues that his damages should have been calculated in accordance with this subsection. Smith argues that the subsection is inapplicable to damages payable to a lessee.

It appears that the failure to mention lessees in subsection 166.24(d) was a simple oversight. A proposed revision of 25 CFR 166.24 (then 25 CFR 151.24) was published in the Federal Register on January 31, 1980, 45 FR 6955. As proposed, subsection 166.24(b) did not include a provision authorizing payment of damages to lessees. Such a provision was added in response to comments received during the comment period. See 45 FR 69445, 69446 (Oct. 21, 1980). It seems likely that the revisers who amended subsection 166.24(b) in response to the public comments simply overlooked subsection 166.24(d). In any event, in the absence of any other provision in the regulation for calculating damages payable to lessees, the Board holds that the method set out in subsection 166.24(d) is applicable to the settlement of all damages payable under subsection 166.24(b), including damages payable to lessees.

[4] The Area Director held that appellant was required to produce evidence of actual damage to his leasehold interest before he could be found entitled to compensation. Appellant seeks compensation both for destruction of property and for consumption of forage.

With respect to destruction of property, appellant's claim asserted that, in 1988, Smith's trespassing cattle destroyed 5 acres of his crop, worth $100 per acre. Appellant submitted no evidence of crop destruction with his claim. On appeal to the Board, appellant does not contend either that he submitted any such evidence to BIA or that any evidence exists. Even the affidavits appellant submitted to the Board, discussed below, say nothing about the alleged crop destruction. Accordingly, the Area Director's decision is affirmed insofar as it relates to appellant's claim for destruction of his crop.

Appellant's claim for consumption of forage stands on a somewhat different footing, because of BIA's prior determinations establishing trespass in 1986 and 1987, and because it must be assumed that the cattle consumed something during their trespasses. BIA's determinations that 139 head of cattle were in trespass on November 18, 1986, and that 1,384 head were in trespass on September 21, 1987, are now final for the Department of the Interior. The Board holds that the existence of a claim for forage consumed during 1986 and 1987 was established prima facie when the fact of trespass was established.

The value of the claim, however, has not been established; nor has it been determined whether or to what extent damages should be payable to appellant rather than Smith's co-owners. BIA has apparently not yet determined how long the 1986 and 1987 trespasses continued. In order to determine the value of forage consumed, it is necessary to take into account both the number of trespassing livestock and the length of time the trespasses continued. Only then may a calculation of value be made in accordance with 25 CFR 166.24(d)(2).

Further, as far as the record shows, there has not yet been a BIA determination concerning whether or not a trespass occurred in 1988. The record does not include any accounts of BIA inspections in 1988 or any contemporaneous complaints of trespasses from appellant.

Appellant's claim was not supported with any evidence of the alleged 1988 trespass or any evidence concerning the length of the trespasses in 1986 and 1987. These omissions were noted in the Area Director's decision.

On appeal to the Board, appellant submits affidavits in support of his claim for consumption of forage. Appellant's own affidavit states in part:

> On November 18, 1986, 139 head of bulls owned by Robert Smith and Claire Smith trespassed on my leased land without my consent or permission. The livestock continued to graze on my leased land for at least one month.
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> On September 20, 1987, before I completed harvesting my grain crop, Mr. Smith and his employees turned in 1,384 head of livestock upon my leased land without my consent or my permission. These animals continued to trespass for sixty (60) days or more.

> On September 3, 1988, Robert Smith and his employees turned in approximately 1,300 head of livestock without my consent or permission. This livestock continued to trespass daily for approximately sixty (60) days or more on my leased lands.
>
> * * * * * *
>
> I personally observed all of the above trespasses and I continued to report these trespasses to the officials of the Blackfeet Indian Agency.

(Appellant's Apr. 17, 1990, Affidavit at 1-2). Appellant also submits an affidavit from William Newman, stating that he had personally observed cattle in excess of 1,000 head on the leased lands in September and October of 1987 and 1988, and that the cattle continued to graze for more than 30 days, consuming all the forage and aftermath crops.

Appellant should have submitted these documents with his initial claim. Normally, the Board does not consider arguments or evidence submitted for the first time on appeal. E.g., Thompson v. Eastern Area Director, 17 IBIA 39, 48 (1989); Estate of George Neconie, 16 IBIA 120 (1988). In this case, however, BIA also failed to complete its tasks under 25 CFR 166.24 and must share responsibility for the lack of evidence in the record. Having observed the 1986 and 1987 trespasses, BIA should have followed through by, at the least, determining the length of trespass and calculating the value of forage consumed. 5/ Further, in light of the documented trespasses which had occurred in the 2 preceding years, BIA should have been alert to the possibility of further trespasses in 1988. As noted above, BIA's duties under this regulation do not run specifically to appellant, but rather to the trust property itself and its Indian owners. In connection with the actions required of it by the regulation, however, BIA can and should consider appellant's claim for forage consumption. 6/ Because this matter must be remanded for the completion of proceedings, BIA may consider appellant's evidence as well as evidence available from other sources.

5/ 25 CFR 166.24 also requires the Superintendent to effect the removal of trespassing livestock, even to the extent of impounding them if necessary. Lease No. L-2643 has a grazing capacity of 90.9 AUM's (animal unit months) and Lease No. L-2734 has a grazing capacity of 122.3 AUM's. Both leases provided that "[s]eason of use and stocking capacity must be approved by the Superintendent before stock are allowed on this lease." When over 1,300 cattle are present on land which has a total grazing capacity of 213.2 AUM's, a concern arises that serious range damage may occur.

6/ In reaching this conclusion, in spite of appellant's arguably ill-prepared claim, the Board notes that no party actively involved in this appeal has "clean hands." BIA has been less than diligent in performing its duties under 25 CFR 166.24. Smith, who argued adamantly in her earlier appeal that she had the right to graze her cattle on the leased lands, and whose argument was rejected by the Board, apparently continues to run her cattle on the property in disregard of the Board's decision in Smith. (The

On remand, BIA should make determinations concerning (1) the length of time the 1986 and 1987 trespasses continued; (2) the value of forage consumed during those trespasses, calculated in accordance with 25 CFR 166.24(d)(2); (3) what portion of that value, if any, should be paid to appellant and what portion should be paid to Smith's co-owners; (4) whether a trespass occurred in 1988, and if so, the amount of damages and penalties owed by Smith, determined in accordance with steps (1) through (3).

As noted, 25 CFR 166.24(b) does not require BIA to pay over damages to appellant. Even though BIA has discretion in this regard, however, its decision concerning compensation to appellant should be reasonable. Cf. Absentee Shawnee Tribe v. Anadarko Area Director, 18 IBIA 156 (1990). BIA should bear in mind that the grazing rights for these leases were vested entirely in appellant. See Smith, 17 IBIA at 235. Accordingly, appellant had the right under the leases, with the approval of the Superintendent, to use the rights himself or to authorize someone else to use them. Even so, if BIA reasonably determines that appellant would not have made use of the grazing rights either personally or by authorization of another, it is entitled to take this factor into consideration in determining the compensation, if any, payable to appellant.

One other matter must be addressed. In his brief before the Board, the Area Director argues that, if appellant is entitled to damages, his recovery must be limited to $597.41, an amount identified by the Superintendent as attributable to rental of pasture land under the leases. 7/ The record in this appeal, however, indicates that the cattle did not confine themselves to the pasture land but also trespassed upon the crop land, consuming so-called "crop aftermath." 8/ The 1986 and 1987 BIA trespass determinations

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fn. 6 (continued)
record in this appeal contains references to trespasses by Smith's cattle in January 1990. The Board's decision in Smith was issued on Aug. 18, 1989. Reconsideration was denied on Sept. 13, 1989.) Apparently neglected in this admittedly messy situation have been (1) BIA's responsibility to protect these Indian lands from damage caused by overgrazing and (2) the rights of the other landowners, whose only mention in the record appears in the leases themselves.

7/ Lease No. L-2643 contains 1,472.2 acres of crop land and 318.16 acres of pasture land. Lease No. L-2734 contains 597.5 acres of crop land and 428.5 acres of pasture land.

8/ "Aftermath grazing" is described in an affidavit submitted on behalf of appellant by Kevin Laughlin, Extension Agent for Toole County, Montana:

"Aftermath grazing involves grazing of stubble fields or volunteer vegetation in the fall of the year primarily the months of September, October and November and for a two or three month period.

"The fact that the grain has been harvested or the residue grain in the stubble is dormant does not detract from the value of the aftermath grazing.

"It is a common practice for certain ranchers to lease the stubble and volunteer grain for pasture and the aftermath grazing is valuable to a person owning the stubble when used for that purpose."

do not indicate that the trespasses were limited to the pasture land. Further, the Superintendent's December 4, 1989, decision recognized that the livestock were "grazing * * * on the crop aftermath." Unless it is shown, therefore, that the trespasses were limited to the pasture land, the rental limitation specified in 25 CFR 166.24(b) should be based on the total rental paid, i.e., $18,407.73 for Lease No. L-2643 and $7,170 for lease No. L-2734.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Billings Area Director's March 2, 1990, decision is affirmed in part and reversed in part; this matter is remanded to him for further proceedings in accordance with this opinion.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge